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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

OFFICIAL COMMITTEE OF UNSECURED CREDITORS
of COLUMBIA GAS TRANSMISSION CORPORATION,
Petitioner,

v.

COLUMBIA GAS TRANSMISSION CORPORATION, et al.,
Respondents.

BRIEF IN OPPOSITION TO

PETITION FOR A WRIT OF CERTIORARI

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LIST OF PARTIES AND RULE 29.1 List

The list of parties are substantially as contained in the list provided by Petitioner except that the Respondents herein known as "The Columbia Gas Distribution Companies" are actually five separate companies: Columbia Gas of Kentucky, Inc., Columbia Gas of Maryland, Inc., Columbia Gas of Ohio, Inc., Columbia Gas of Pennsylvania, Inc. and Commonwealth Gas Services, Inc.

These five companies are wholly owned subsidiaries of The Columbia Gas System, Inc.

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STATEMENT OF THE CASE

Petitioner, Official Committee of Unsecured Creditors (herein Petitioner), has not provided the Court with a statement of the case but rather with a misleading and inaccurate argument. It is therefore incumbent upon the Respondents to state the case fairly.

1. Bankruptcy Court Proceeding

The Debtor, Columbia Gas Transmission Corporation (herein Debtor), is an interstate pipeline company which filed Chapter 11 proceedings in the Bankruptcy Court for the District of Delaware on July 31, 1991. The Debtor is regulated by the Federal Energy Regulatory Commission (herein FERC).[1]

On August 23, 1991, the Debtor filed a motion in Bankruptcy Court seeking "authorization to comply with its Federal Energy Regulatory Commission Gas Tariff and orders and regulations of the Federal Energy Regulatory Commission." Pet. App. 123a.[2] Those tariffs and orders of FERC required the Debtor to make refund payments to its customers which are local gas distribution companies (LDC) and to make surcharge payments to the Gas Research Institute. The refunds result from prior overcharges for gas supplies incurred by the customers of the Debtor and the ultimate consumers served by those customers as determined by the Court of Appeals for the District of Columbia. Pet. App. 49a, citing *Associated Gas Distribs. v. FERC*, 893 F.2d 349 (D.C. Cir. 1989) *cert. denied*, 111 S.Ct. 277 (1990). Whether the refund payments are property of the Debtor's estate under 541(d) of the Bankruptcy Code was the question presented to the Bankruptcy Court.

The Bankruptcy Court held a three day evidentiary hearing on the Motion. The focus of the evidentiary hearing was the federal

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[1] For the period pertinent to this proceeding, Debtor transported and sold natural gas at wholesale to affiliated and unaffiliated distribution companies through its 18,900 mile pipeline network serving parts of 15 states.

[2] The Petition will be referred to as "Pet." and the Petition Appendices will be referred to as "Pet. App."

regulatory requirements placed on the Debtor and the Debtor's mechanisms for complying with those requirements. The hearing also provided evidence to the effect that each LDC to which Debtor supplied gas was subject to state regulation that mirrored the federal regulatory scheme.[3] No evidence or information was presented to the Bankruptcy Court concerning the property or trust law of any state.

The Petitioner argued that state law should apply. The Bankruptcy Court, in its decision of February 13, 1992, concluded that federal common law should apply and that under federal common law, particularly as applicable in the Third Circuit, the Debtor had proven that the refunds were held in trust when received. The Bankruptcy Court did qualify its ruling by holding that certain refunds, those that were to have been collected by or before the Bankruptcy petition date, were restricted by a federal common law trust doctrine known as the lowest intermediate balance test.

2. District Court

The Petitioner appealed the Bankruptcy Court's determination to the District Court arguing that the Bankruptcy Court erred in applying federal law, rather than state law, and that the Bankruptcy Court erred in finding that the supplier refunds were held by the Debtor in trust for its customers. The Customers Committee also appealed, contending that the Bankruptcy Court erred in ruling that the payment of those refunds collected by the petition date should be limited by the lowest intermediate balance test.

Following briefing and oral argument, the District Court issued an order on July 6, 1992, reversing the Bankruptcy Court. The District Court said that the Bankruptcy Court erred in applying federal, rather than state law. Pet. App. 95a *et seq.* The District Court

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[3] In order that each LDC charge fair and reasonable rates under state requirements, each LDC is required to pass along refunds ordered by FERC to the ultimate consumers. It is these ultimate consumers who were originally overcharged for gas service and who will be beneficiary of refunds as to the overcharges. Affiliated distribution companies must also pass refunds to their ultimate consumers. Contrary to the constant innuendo in the Petition, the affiliated LDCs are treated no differently than other distribution companies and in fact are likely to be more closely scrutinized by their State Utility Commissions because of the affiliation.

made this ruling despite concluding that the Bankruptcy Court's findings of fact were not clearly erroneous. Instead, the District Court determined that it should reject application of federal common law, based on its conclusion that federal regulation of the natural gas industry is far less pervasive than federal regulation of the railroad industry. Pet. App. 95a-97a. Thus, the District Court rejected the application of *Matter of Lehigh and N.E. Ry. Co.*, 657 F.2d 570 (3d Cir. 1981) and *In Re Penn Central Transportation Co.*, 486 F.2d 519 (3d Cir. 1973), *cert. denied*, 415 U.S. 990 (1974). The District Court went on to apply state trust law and determined that, under state law, a trust relationship did not exist.

3. Circuit Court

Numerous parties, including these Respondents, Columbia Gas of Kentucky, Inc., Columbia Gas of Maryland, Inc., Columbia Gas of Ohio, Inc., Columbia Gas of Pennsylvania, Inc. and Commonwealth Gas Services (collectively known as The Columbia Gas Distribution Companies) appealed the District Court's determination to the Third Circuit Court of Appeals. The Circuit Court exercised the same review over the Bankruptcy Court's order as did the District Court. Pet., App. 55a, citing *Brown v. Pennsylvania State Employees Credit Union*, 851 F.2d 81, 84 (3d Cir. 1988). That is, the Bankruptcy Court's factual findings are not disturbed unless clearly erroneous but the Circuit Court conducts a plenary review of ultimate legal conclusions. *Meridian Bank v. Alten*, 958 F.2d 1226, 1229 (3d Cir. 1992).

Using that standard of review, the Circuit Court concluded that federal common law should apply and that under federal common law a "trust" was created whereby the refunds in question were held in trust. In declining to consider state law, the Circuit Court noted that "... FERC's objective of ensuring the exploited customers to receive the full amount of their refunds would be subverted by state law. Application of the federal common law rule is necessary to prevent such an outcome." Pet. App. 50a.

In his dissent, Judge Nygaard of the Third Circuit, suggested that traditional trust law should not be applied and that "Instead, we should balance the competing policies and try to discern congressional intent behind the Bankruptcy Code, 11 U.S.C. §§541(d), and the Natural Gas Act (NGA), 15 U.S.C. §717 et seq.", Pet. App. 71a. Judge Nygaard concluded that the refunds should be made without the limitation of the lowest intermediate balance doctrine applied under a trust theory.

ARGUMENT

FEDERAL COURTS PROPERLY UTILIZE FEDERAL COMMON LAW WHEN DETERMINING PROPERTY RIGHTS IN A BANKRUPTCY PROCEEDING WHEN THE PROPERTY RIGHT HAS BEEN CREATED BY FEDERAL MANDATE

I

There is no conflict between the circuits-each case must be decided on its own circumstances

In concluding its argument that "the courts of appeal have taken widely diverging approaches to the appropriate scope of federal common law preemption" (Pet. 8), Petitioner states that "in the Seventh Circuit, federal law will rarely, if ever, preempt state trust law with respect to claims against a federally-regulated bankrupt, while in the Third Circuit federal law now will always preempt state law ..." Pet. 14.

On the contrary, in making determinations as to choice of law questions, the federal courts do not act automatically as Petitioner suggests, but consider the facts and circumstances in each case before them. As we shall point out, Petitioner has equated failure to reach a uniform result with failure to follow this Court's mandate to analyze each case on its merits.

Property rights in a bankruptcy are created and defined by state law unless a federal interest requires a different result. *Butner v. U.S.*, 440 U.S. 48, 54 (1979). Petitioner assumes that this dictum in *Butner* presents a question of "preemption".[4] As Justice Black stated in *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) and Chief Justice Warren reiterated in *Pennsylvania v. Nelson*, 350 U.S. 497 (1955), federal courts have used "preemption" interchangeably with other terminology. Typically, preemption has often been referred to by many different terms: "conflicting; contrary to; occupying the

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[4] These Respondents do not agree with Petitioner that the question presented in this case is one of "preemption" in the traditional sense, that is where federal law is in direct actual conflict with state law, but concedes the use of "preemption" for purposes of responding to the Petition.

field; repugnance; difference; unreconcilability; inconsistency; violation; curtailment and interference." *Hines*, 312 U.S. at 67; *Nelson*, 350 U.S. at 502. Justice Black stated, "In the final analysis, there can be no one crystal clear formula... Our primary function is to determine whether under the *circumstances of this particular case*... [state law conflicts with federal law], (emphasis supplied). *Hines*, 312 U.S. at 67.

Determining the circumstances of a case where a federal regulatory program is involved requires the examination of the "nature" of the federal program to determine the choice of law question. As Justice Marshall has stated, "federal programs that by their *nature* are and must be uniform in character" necessitate application of federal law, (emphasis supplied). *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979).

The only way to determine the "circumstances" of a case or the "nature" of the federal program or scheme is to look at both law and fact. That is what the Seventh Circuit did in *In Re Iowa R.R.*, 840 F.2d 535 (7th Cir. 1988), *cert. denied*, 488 U.S. 899 (1988). In *Iowa*, the Court had before it the question of whether certain interline balances of the Debtor Railroad in a Bankruptcy proceeding were held in trust for the benefit of other carriers.[5] The Seventh Circuit reviewed federal statutory law and found that the Interstate Commerce Commission (ICC) had not exercised regulatory power over interline balances and that the ICC accounting rules did not apply to small railroads such as Iowa Railway Company. The Court then reviewed federal policy and found that there was no longer a federal plan for coordinating and preserving a national transportation system.[6] Against this backdrop, the Seventh Circuit then stated that the circumstances before the Court indicated, "Private parties stand on both sides of this transaction. Congress has not occupied the field in question". *Iowa*, 840 F2d at 540. The Court then concluded that in the circumstances of the case before it, "It is not

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[5] As explained in *Iowa*, interline balances involve those occasions where the originating carrier receives payment for the entire movement of a commodity and then sets off that amount against other transactions.

[6] Both *Penn Central, supra* and *Lehigh, supra* were decided based on circumstances as they existed before the passage of the new Rail Transportation Policy.

so *clearly* important that a federal court may create federal common law to trump the state law. . .", (emphasis supplied). *Iowa,* 840 F2d at 542.

The circumstances presented to the Third Circuit in this case were entirely different from those in *Iowa.* In looking at the "circumstances" of this case, the Third Circuit came to a different conclusion than the Seventh Circuit in *Iowa.* In this case the Third Circuit had to determine if refunds resulting from an Order of the FERC were held in trust by the Debtor. The Third Circuit reviewed federal statutory law and found that the refunds at issue were created by an order of the Federal Energy Regulatory Commission (Pet. App. 48a) and that the Debtor maintained its accounts in accordance with the accounting system promulgated by FERC. Pet. App. 43a. The Court then reviewed federal policy and found that "a national uniform law is necessary." Pet. App. 48a. Against this backdrop the Third Circuit stated, "the very purpose of the NGA (Natural Gas Act) is to supersede private contractual arrangements that interfere with the federal objective" and concluded "the property right Columbia has in these refunds should not be subject to the vagaries of a state trust law." Pet. App. 49a.

Both the Seventh Circuit in *Iowa* and the Third Circuit in this case used a similar analysis of the facts and the applicable federal statutes and policy to determine whether a federal interest required that federal law be applied. The result of the analysis in *Iowa* was that state law applied; the result of the same analysis by the Third Circuit in this case was that federal law applied. The results were different, but the analysis was the same. So long as each court conducts this analysis of law and fact, the conflict suggested by Petitioner does not exist and there is no reason for this Court to grant certiorari.

II
The third Circuit decision is consistent with decisions of this court

Petitioner urges that the Third Circuit's decision is "flatly inconsistent with numerous decisions of this Court ...". Pet. 9. This argument is not valid. The Third Circuit's decision is in accord with the pronouncements of this Court.

Although application of state law may often be favored in a dispute giving rise to an action in federal Court, there is always an exception for application of federal law if the federal interest is sufficient to warrant it. *Butner, supra.* Chief Justice Burger recognized the parameters for the application of federal common law in *Texas Industries v Radcliff Materials,* 451 U.S. 630 (1981). There he stated that "the Court has recognized the need and authority in some limited areas to formulate what has come to be known as 'federal common law' (citation omitted)" and noted federal common law should apply when 'necessary to protect uniquely federal interests' (citation omitted) 451 U.S. at 640. Chief Justice Burger has elaborated on the use of federal common law by the federal judiciary in *United States v. Little Lake Misere L. Co.,* 412 U.S. 580 (1973) at 593:[7]

> ...At the very least, effective Constitutionalism requires recognition of power in the federal courts to declare, as a matter of common law or 'judicial legislation,' rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress. In other words, it must mean recognition of federal judicial competence

[7]While the United States was a party in *Little Lake Misere Land Co.,* which Petitioner will suggest distinguishes it, it is cited for Chief Justice Burger's statement on effective use of federal common law by the federal courts.

> to declare the governing law in an area comprising issues substantially related to an established program of government operation.' Mishkin, 105 U Pa L Rev, at 800.

The Third Circuit's decision is in harmony with this dictum and also is in accord with this Court's statement in *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979). In *Kimbell Foods*, Justice Marshall stated:

> Controversies directly affecting the operation of federal programs although governed by federal law, do not inevitably require resort to uniform federal rules ... (citations omitted). Whether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy 'dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law'. Citing *United States v. Standard Oil Co.*, 323 U.S. 301 (1947). *Kimbell Foods*, 440 U.S. at 727-28.

There is one conclusion readily drawn from this Court's previous discussion of choice of law, which serves as a mandate to the lower federal courts: it is incumbent on a federal court to make a complete and thorough examination of the nature of the federal program or scheme based on the circumstances of the particular case.

The Third Circuit carried out this mandate consistent with the decisions of this Court when it examined the circumstances of this case.

CONCLUSION

These Respondents assert that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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